

Internal Revenue Service
memorandum

CC:TL-N-8144-87

Br2:WDHussey

date: JUL 13 1987

to: District Counsel, Washington, D.C.
Attn: Craig A. Etter

CC:WAS

from: Director, Tax Litigation Division

CC:TL

subject: [REDACTED]

This responds to your memorandum of June 5, 1987, asking our views whether the Government should pay the sum of \$60.00 in settlement of the petitioner's request for litigation costs.

Petitioner filed suit on [REDACTED]. It is our understanding that a stipulated decision showing no deficiency will be signed by petitioner for submission to the Tax Court once the litigation costs issue is settled in his favor.

ISSUE

Whether to pay the Tax Court filing fee claimed by petitioner as an award of reasonable litigation costs pursuant to I.R.C. § 7430 when the Service misplaced taxpayer's records and issued an improper statutory notice of deficiency. 7430.00-00.

CONCLUSION

We concur in your recommendation to pay the \$60.00 filing fee, given the administrative errors made and the small size of the claim. The decision document should state that the parties have agreed to an award of litigation costs pursuant to section 7430 in the amount of \$60.00.

FACTS

Petitioner [REDACTED]'s individual income tax return for [REDACTED] was audited by the Baltimore Examinations Division. The examiner asked him to provide documents and information in order to substantiate deductions claimed on the return. Petitioner sent the requested papers to the Baltimore District office by certified mail on [REDACTED]. The papers were misplaced and did not reach the examiner until early [REDACTED].

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On [REDACTED], a statutory notice of deficiency was issued to petitioner. On [REDACTED], he wrote to the examiner asking that the matter be resolved. When the examiner did obtain the documentation she determined that all items had been properly substantiated and that no additional tax was owing with respect to petitioner's [REDACTED] return.

Petitioner was informed of this by telephone, and there are conflicting versions as to the exact wording used. By letter of [REDACTED] the examiner's group manager informed petitioner that the examiner "did reconsider your examination and no additional tax should result from your [REDACTED] Form 1040." The petitioner claims that he was not certain whether use of the word "should" meant that the Service was stating that no additional tax would be imposed. On [REDACTED] he filed a timely petition with the Tax Court. On [REDACTED] the examiner wrote to him that the statutory notice of deficiency should be disregarded.

No 30-day letter of proposed deficiency had been issued. Petitioner was never asked to participate in an Appeals office conference. District Counsel did not participate in the review or issuance of the notice of deficiency.

DISCUSSION

Section 7430 provides that reasonable litigation costs may be awarded a taxpayer. He must:

(1) substantially prevail with respect to the amount in controversy or the most significant issue or set of issues presented, section 7430(c)(2)(A)(ii)(I) & (II);

(2) exhaust the administrative remedies available within the Service, section 7430(b)(1); and

(3) establish that the position of the United States in the civil proceeding was not substantially justified, section 7430(c)(2)(A)(i).

Prevailing as to the amount in controversy or the most significant issues are alternative grounds for concluding that the taxpayer has substantially prevailed. Phillips v. Commissioner, 88 T.C. No. 26 (March 5, 1987). The Service has conceded the entire amount of the deficiency determined in the statutory notice. The Service's concession is an acknowledgment that the determinations made against petitioner in the statutory notice of deficiency were erroneous because petitioner had in fact provided proper substantiation. Petitioner has satisfied the conditions for substantially prevailing.


Petitioner also is deemed to have exhausted his administrative remedies. A taxpayer is considered to do so in the case of a petition to the Tax Court when he does not receive a preliminary 30-day notice of proposed deficiency and does not refuse to participate in an Appeals conference while the case is docketed. Treas. Reg. § 1.7430-1(f)(2). Petitioner did not receive a 30-day letter and it was not suggested to him that he attend an Appeals conference.

While we do not believe that petitioner can prove that the Government's position was not substantially justified, we are concerned that given the lack of merit in the Government's position, the court might rule in petitioner's favor. Section 7430(c)(4) defines the "position of the United States" to include (A) "the position taken by the United States in the civil proceedings," and (B) "any administrative action or inaction by the District Counsel of the Internal Revenue Service (and all subsequent administrative action or inaction) upon which such proceeding is based." The position taken in the civil proceedings was substantially justified because District Counsel agreed quickly to concede the case once the petition had been filed. As to the administrative action or inaction, this office currently takes the position that unless District Counsel reviewed the statutory notice of deficiency or was involved at the administrative level there was no prelitigation position subject to scrutiny under the "not substantially justified" test of section 7430(c)(2)(A)(i). So far no court has decided whether our interpretation of section 7430(c)(4)(B) is correct. We prefer to have the issue placed before a court in a case with more favorable facts to us than the instant one offers. Moreover, the \$60.00 award of costs sought by petitioner is small.

We concur in your recommendation to pay the \$60.00 Tax Court filing fee incurred by petitioner as an award of litigation costs to which he is entitled pursuant to section 7430. The decision document should state that the parties have agreed to such an award.

If you have any further questions, please contact William D. Hussey of this office at 566-3520.

ROBERT P. RUWE
Director
Tax Litigation Division

By: 
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